

7/29/20

THREE AFFILIATED TRIBES

SUPREME COURT

FORT BERTHOLD RESERVATION

NEW TOWN, ND 58763

Raymond Cross;

Marilyn Hudson.

Plaintiffs/Appellants.

ORDER

Case No. AP 2019-AP-006

vs.

Mark Fox, individually and as a member of the Three Affiliated Tribes Tribal Business Council; Randy Phelan, individually and as a member of the Three Affiliated Tribes Tribal Business Council; Fred Fox, individually and as a member of the Three Affiliated Tribes Tribal Business Council; Mervin Packineau, individually and as a member of the Three Affiliated Tribes Tribal Business Council; Frank Grady, individually and as a member of the Three Affiliated Tribes Tribal Business Council; Cory Spotted Bear, individually and as a member of the Three Affiliated Tribes Tribal Business Council; Monica Mayer, individually and as a member of the Three Affiliated Tribes Tribal Business Council.

Defendants/Appellees.

The Fort Berthold District Court issued its Opinion and Order, in the above-captioned matter on August 5, 2019, granting the Defendants summary judgment and dismissing Plaintiff's claims. The Plaintiff's appealed the summary judgment to the MHA Nation Supreme Court, filing a Notice of Appeal on October 24, 2019. Accompanying the Notice of Appeal were the Appellants Brief and a Request for Oral Argument. The Appellees' Brief was filed on November 13, 2019. The Plaintiffs filed a Motion for

EXHIBIT

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44 Additional Briefing, Brief In Support of Motion and Reply Brief on December 9, 2019. The  
45 Defendants opposed the Plaintiffs Motion for Additional Briefing. This Court denied  
46 additional briefing but granted the Plaintiffs Request for Oral Argument. Oral Argument in  
47 the above-captioned matter was held on June 3, 2020. Due to the current global pandemic,  
48 the health and safety of litigants, court personnel and Justices dictated that oral arguments  
49 in the above-captioned matter occurred via a virtual platform. All parties were present at  
50 oral argument.

### 52 BACKGROUND

53 The Plaintiffs, Raymond Cross and Marilyn Hudson, are both enrolled members of  
54 the Three Affiliated Tribes. Marilyn Hudson is a resident of the Fort Berthold Reservation  
55 while Raymond Cross is a non-resident. At the heart of this case is a 1986 amendment to  
56 the TAT Constitution stating that "...an eligible voter of the Three Affiliated Tribes, whose  
57 place of legal residence is located outside of the exterior boundaries of the Ft. Berthold  
58 Reservation on the date of an election, shall return to the Reservation in order to vote in  
59 the appropriate segment polling place on the date of the election." *Article IV § (2) b) of the*  
60 *TAT Constitution (as amended 1986).*

61 This cause of action was initiated on November 2, 2018 when the Plaintiffs filed a  
62 complaint in the Fort Berthold District Court requesting a preliminary injunction. The  
63 complaint specifically requested that absentee ballots be made available to non-resident  
64 voters and that the court order a stay of the November 6, 2018 election results until such  
65 time as absentee ballots could be distributed and processed. The complaint also requested  
66 that the lower court enjoin the enforcement of the "return to reservation" requirement of  
67 the TAT Constitution and asked for declaratory judgment invalidating the "return to  
68 reservation" provision of the TAT Constitution. The Defendants, elected members of the  
69 Three Affiliated Tribes Tribal Business Council ("TBC") filed a motion to dismiss the  
70 complaint. The Plaintiffs responded to the Motion to Dismiss, and the Defendants replied to  
71 the responsive pleading.

72 The District Court denied the request for preliminary injunction and converted the  
73 TBC motion to Dismiss to a motion for summary judgment on grounds that the facts of the  
74 case were not in dispute and could thus be appropriately determined by summary

75 judgment. The District Court heard oral arguments on May 30, 2019, and issued an  
76 Opinion and Order on August 5, 2019 wherein it granted summary judgment to the  
77 Defendants and dismissed the case.

78 **ISSUE(S)**

79  
80 The issue before this Court is whether the Fort Berthold District Court erred when it  
81 granted summary judgment to Defendants and dismissed the lower court cause of action.

82  
83 **ANALYSIS**

84 The first issue raised by Plaintiffs on appeal relates to the lower court's treatment of  
85 the Motion to Dismiss as a motion for summary judgment. To this issue the Tribal Rules of  
86 Civil Procedure are clear "A motion to dismiss may be treated as a motion for summary  
87 judgment"<sup>1</sup>. The decision to treat a motion to dismiss as a motion for summary judgment  
88 rests in the complete discretion of the trial judge and we find no error in the court doing so  
89 in this case. Absent procedural error on the part of the lower court we turn to the  
90 substantive arguments made on appeal.

91 The Three Affiliated Tribes (the "Tribe") opted to be federally recognized in  
92 accordance with the Indian Reorganization Act of 1934 ("IRA"). Generally speaking, the  
93 IRA was an attempt by the United States Congress to support tribal self-determination,  
94 recognizing tribal sovereignty as an absolute and subject only to the express Congressional  
95 limitations provided in treaties or legislation. Shortly after electing to reorganize in  
96 accordance with the IRA, the Tribe adopted a tribal constitution and bylaws thereby  
97 providing a framework for the exercise of self-governance. It is important to note that  
98 although the IRA contained a provision for supporting efforts of tribes to "...adopt an  
99 appropriate constitution and bylaws...", the Act itself did not contain any mandated  
100 language for tribal constitutions.<sup>2</sup> Creation of tribal constitutions, and amendments, was  
101 and remains an act of self-determination rooted in inherent sovereign rights of the tribes to

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<sup>1</sup> Tribal R. Civ. P. 6.

<sup>2</sup> Felix S. Cohen, *On the Drafting of Tribal Constitutions* 3 (2006); many tribes opting for federal recognition under the IRA adopted a template constitution that was circulated by the Bureau of Indian Affairs after the Act was passed however there was no federally mandated language relevant to Tribal Constitutions.

102 self-govern. To this end, tribes have great latitude in shaping their branches of government,  
103 specifying leadership roles and responsibilities, establishing qualifications for tribal  
104 government officials, determining membership, citizenship and voter eligibility criteria and  
105 creating individual rights within their constitutional framework.

106 For many tribes, constitutional reform has been a necessary part of the evolution of  
107 self-governance. Early tribal constitutions oftentimes provided an inadequate framework  
108 to meet the important and diverse roles necessary for comprehensive self-governance.  
109 Relevant to the Tribe in this action, and since the original enactment of the Tribe's  
110 Constitution and Bylaws, constitutional reform and amendment has occurred.<sup>3</sup> In  
111 accordance with Article X of the TAT Constitution, any amendments to the Tribe's  
112 Constitution may occur only "...by a majority vote of the qualified voters of the tribes voting  
113 at an election called for that purpose by the Secretary of the Interior... no amendment shall  
114 become effective until it shall have been approved by the Secretary of the Interior. It shall  
115 be the duty of the Secretary of the Interior to call an election on any proposed amendment  
116 when requested by a two-thirds (2/3) vote of the Tribal Council, or upon presentation of a  
117 petition signed by one-third (1/3) of the qualified voters".<sup>4</sup> In this case, all parties agree  
118 that the proceedings for adoption of the 1986 amendments to the Tribe's Constitution were  
119 conducted in a manner consistent with Article X of the TAT Constitution as well as  
120 applicable provisions found in the Code of Federal Regulations pertaining to Secretarial  
121 Election Procedures.<sup>5</sup> Absent any error by the lower court relevant to procedural findings  
122 regarding the 1986 amendment process, the Court will move on to consider the lower  
123 court's substantive findings regarding the 1986 amendments to the Tribe's Constitution.

124 The Plaintiffs in this case contend that, despite the absence of procedural  
125 irregularity in the 1986 Tribe's Constitutional Amendment, the return to reservation  
126 language incorporated in the nonresident voter provisions of the Tribe's Constitution  
127 conflict with other provisions within the same Constitution, violates their civil liberties  
128 under the ICRA and as such should be deemed unlawful.

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<sup>3</sup> Approved June 29, 1936; Amendments authorized after Secretarial Election(s)/ Referendum(s) in 1956, 1961, 1970, 1974, 1985, 1986, and 2010.

<sup>4</sup> Article X- Amendments, TAT Constitution.

<sup>5</sup> 25 C.F.R. 81

Plaintiffs contend that the conflicting constitutional provisions within the Tribe's Constitution warrant a finding that Article IV, § 2(b) be determined unlawful or unconstitutional. In particular, the Plaintiffs cite to Article IV, § 2(b) requiring that non-residents return to the reservation to vote and Article VI, § 3(b) granting the Tribal Court the authority to enforce ICRA provisions as being in conflict. The lower Court addressed this argument and determined that one provision of the Constitution cannot be "rendered unconstitutional" by another provision of the Constitution, and further determined that where ambiguities exist the court must "...give effect and meaning to every constitutional provision and reconcile, if possible, apparently inconsistent provisions."<sup>6</sup> The Court went on to find that there was no ambiguity between the Article IV, § 2(b) and Article VI, § 3(b).<sup>7</sup> This Court agrees and finds both cited provisions of the Tribe's Constitution to be clear, unambiguous and fully enforceable. Although we find no ambiguity with the cited Constitutional provisions, we must still consider the impact of the ICRA, if any, on the laws impacting voters.

Since the Marshall trilogy emerged in the United States Supreme Court, an entire body of federal common law has examined the extent to which federal law applies to the interpretation and application of tribal laws, including instances involving intratribal matters. The United States Supreme Court, in *Talton v. Mayes*<sup>8</sup>, made it clear that the federal constitutional rights do not apply to actions of tribal governments. In fact, prior to 1968, there was no federal legislation to protect individual tribal members against actions of tribal governments.<sup>9</sup> This is not to say that tribes generally lacked any protections or individual civil liberties, however, any such rights were afforded as a matter of tribal law and not federal law.

In 1968, the U.S. Congress passed the Indian Civil Rights Act. This legislation was clearly intended to expressly limit the actions of tribal governments by prescribing definitive civil liberties for tribal members. The guarantees afforded to individuals under

<sup>6</sup> See FBDC Opinion and Order at page 6 (August 5, 2019).

<sup>7</sup> See FBDC Opinion and Order at page 7 (August 5, 2019)

<sup>8</sup> 163 U.S. 376 (1898) (finding that the Fifth Amendment of the U.S. Constitution did not apply to laws of the Cherokee Nation and further determining that the authority to interpret Cherokee law rested solely with the courts of the Cherokee Nation)

<sup>9</sup> 25 U.S.C. §§ 1301-1304



the ICRA, however, are not the equivalent of guarantees afforded under the United States Constitution.<sup>10</sup>

In *Santa Clara v. Martinez*<sup>11</sup>, the United States Supreme Court issued an opinion that has dramatically impacted the interpretation and enforcement of ICRA. In *Santa Clara*, the United States Supreme Court dismissed an action seeking declaratory and injunctive relief relevant to a tribal membership ordinance that restricted tribal membership in inter-tribal marriages to children born of male members of the tribe. In reaching this conclusion, the United States Supreme Court determined that "...in the absence here of an unequivocal expression to the contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit"<sup>12</sup>. The United State Supreme Court also recognized the dual statutory purposes of the ICRA which were intended to both strengthen tribal self-determination while also strengthening the position of individual members in relation to the tribe.<sup>13</sup> When interpreting and applying the rights afforded by virtue of the Indian Civil Rights Act, courts must consider the rights of individuals while also honoring the sovereignty, custom and tradition of tribes that the Act professed to further.

In this case, the lower court recognized the authority of the Tribal Court to enforce the provisions of the ICRA.<sup>14</sup> The lower court went on to state that the ICRA would only apply "if it determined through an adjudication that the TBC has in specific instance violated the Act"<sup>15</sup>. The court found that the TBC could not have violated the Act based upon the 1986 Constitutional Amendment in large part due to the fact that the TBC has no authority to amend the TAT Constitution. Rather that authority rests exclusively with the

<sup>10</sup> See *Wounded Head v. Oglala Sioux Tribe*, 507 F.2d 1079 (8<sup>th</sup> Cir. 1975)(recognizing that the power of Indian tribes to govern their own affairs is limited by treaty and the plenary power of Congress); See also *Tom v Sutton*, 533 F.2d 1101 (9<sup>th</sup> Cir 1976)(noting that due process and equal protection under the ICRA have been construed with due regard to historical, governmental and cultural values of a respective Indian tribe; and further acknowledging that rules of constitutional construction require interpretation in light of the entire document, to be construed in harmony with each other if possible.)

<sup>11</sup> 436 U.S. 49 (1978)("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.")

<sup>12</sup> *Id.* At 55, 59

<sup>13</sup> *Id.* At 62, 64.

<sup>14</sup> See page 4 Opinion and Order of FBDC (August 5, 2019)(noting that the relief available for alleged ICRA violations was limited to injunctive relief).

<sup>15</sup> *Id.*

177 qualified voters of the tribe.<sup>16</sup> In other words, even if the TBC wanted to amend the  
 178 Constitution, there is no such authority vested within the governing body to do so absent a  
 179 Secretarial Election. This Court agrees that the TBC has no authority to independently  
 180 amend provisions of the Tribal Constitution nor are they at liberty to pick and choose  
 181 which provisions of the Tribal Constitution they will adhere to or enforce. Should members  
 182 of the Tribe wish to amend the Tribal Constitution, there is a process to do so set forth in  
 183 Article X of the Constitution. Finding no error by the lower court relevant to procedural or  
 184 substantive findings regarding the 1986 amendment we will move on to the remaining  
 185 issues pertaining to alleged restraints on the civil liberties alleged by the Plaintiffs.

186 Although the lower court declined to find the 1986 Amendment unlawful under an  
 187 ICRA analysis, that does not in and of itself resolve the civil liberties issues raised by  
 188 Plaintiffs. The rights of tribal members to vote and participate in the tribal electoral  
 189 process is a matter of tribal law and not federal law. As tribes enacted constitutions and  
 190 bylaws they have done so as an exercise of inherent sovereignty. Tribes across the nation  
 191 vary dramatically in defining voter eligibility and the procedures that apply to voting.<sup>17</sup> It  
 192 is within the inherent sovereignty of the tribe to determine whether and electoral process

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<sup>16</sup> Title X TAT Constitution.

<sup>17</sup> See examples of Constitutions and Bylaws of the following IRA Tribes:

**Blackfeet Nation of Montana** Constitution (stating in relevant part that any member of the Blackfeet Tribe, 18 years of age or over, shall be eligible to vote at any election when he or she presents himself or herself at a polling place within his or her voting district); **Tohono O'odham Nation** (stating in relevant part that all members who have reached the age of 18 years prior to the election have the right to vote provided they comply with any and all ordinances regulation elections authorized by the Constitution); **Mashantucket Pequot Tribe** (stating in relevant part that all tribal members who are of age 18 years or older shall be voting members but also stating that no votes may be cast by proxy or absentee ballot); **Gila River Indian Community** (stating in relevant part that all adult members who have attained the age of 21 years shall, unless non compos mentis, have the right to vote in any election); **Havasupai tribe of the Havasupai Reservation of Arizona** (stating in relevant part that the members of the Tribal Council must be comprised of eligible voters age 35 or older and also stating that only enrolled members over the age of 21 years will have the right to vote); **Pueblo of Isleta** (stating in relevant part that enrolled members of age 18 years or older shall be eligible to vote, provided they register; early voting is authorized pursuant to ordinance).

There exist many additional examples of tribal constitutions that demonstrate variances in governance structures and voter qualifications. For example, some tribes have defined branches of government, while others vest all duties in a singular branch; tribes also vary in terms of required qualifications membership or citizenry, voter rights, criteria for government leadership and again still for the manner in which elections are conducted. Ultimately, tribal governments retain the inherent authority to determine their own governance structures. see *Tribal Nations and the United States: An Introduction*, National Congress of American Indians, (February 2020), at 22 and 32

[http://www.ncai.org/tribalnations/introduction/Tribal Nations and the United States An Introduction-web.pdf](http://www.ncai.org/tribalnations/introduction/Tribal%20Nations%20and%20the%20United%20States%20An%20Introduction-web.pdf)

193 will be incorporated into their self-governance and to further define voter eligibility and  
194 rights. To this end there is nothing to preclude a tribe from limiting eligible voters by  
195 membership status, age and even residency as is reflected in the TAT Constitution. Once a  
196 tribe has established a right by virtue of the tribal constitution, it then follows that the  
197 tribal governing body does not infringe upon such rights in an unlawful manner.<sup>18</sup>

198 At the heart of this case the Plaintiffs argue that rights of non-resident enrolled  
199 members to vote in tribal elections have been unduly burdened by the return to  
200 reservation voting requirement of the Tribe's Constitution. Plaintiffs contend that the  
201 manner in which ballots may be cast by resident versus non-resident voters has resulted in  
202 a violation of their rights to due process and equal protection under the ICRA. There is no  
203 question that resident and nonresident members are treated differently under current  
204 tribal law. However, the differential treatment relates exclusively to absentee balloting.<sup>19</sup>  
205 In other words resident voters may qualify for an absentee ballot while non-resident voters  
206 cannot. Outside of absentee balloting, all eligible voter must register and cast ballots on the  
207 reservation at a polling site. We are not convinced that the Tribe's Constitution is the  
208 source of disparate treatment of resident and non-resident voters. In fact, when  
209 considering the language of the Tribe's Constitution and Election Ordinance  
210 simultaneously, both resident and non-resident voters must register with a segment and  
211 report to a segment polling place to cast their ballot. Resident voters must register in the  
212 segment where they reside while non-residents are afforded a one-time opportunity to  
213 choose the segment that they will vote in. Beyond the initial choice of segment, the only  
214 clear distinction between resident and nonresident voters, in terms of process for casting  
215 ballots, can be found in the Title XII of the tribal code governing tribal elections. Title XII is  
216 clear that absentee ballots will be afforded to qualifying resident voters but not to non-  
217 resident voters. There is no question that resident and nonresident voters are treated  
218 differently under the law, however the differential treatment only relates to absentee

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<sup>18</sup> See 25 USC § 1302

<sup>19</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)(finding that the lawfulness of a tribal membership ordinance treating the children of certain male members of the tribe differently than the children of certain female members of the tribe is reserved for tribal determination; the Court also noted lower court findings that the ordinance "...reflected traditional values of patriarchy significant in tribal life" thereby sustaining the validity of the ordinance)



219 balloting. Outside of absentee balloting, all eligible voters must register and cast ballots on  
220 the reservation at a polling site.

221       The question thus becomes whether the TBC has violated the equal protection  
222 provision of the ICRA by creating a legislative exception to the on reservation voting  
223 requirement for resident voters without affording the same or similar exceptions to non-  
224 resident voters. Under a U.S. Constitutional analysis, when an equal protection violation is  
225 alleged to have occurred the Court will consider whether the law impacts a suspect class or  
226 a fundamental right to determine the proper legal analysis. If the U.S. Supreme Court finds  
227 that a suspect class or fundamental right is impacted, the governmental action will be  
228 subject to review under an intermediate or strict scrutiny analysis. It is important to note,  
229 however, that the U.S. Supreme Court has been clear that the standards applicable to rights  
230 afforded under the U.S. Constitution are not applicable to the rights afforded under the  
231 ICRA. The level of scrutiny to be applied to legislative actions of the TBC, is therefore, a  
232 matter tribal interpretation and of first impression for this Court.

233       Although this Court is not required to follow the same legal analysis applicable to  
234 rights afforded under the U.S. Constitution, in this case we find no existence of a suspect  
235 classification based upon race, religion, national origin or alienage. The only distinction to  
236 be drawn between the groups represented in this case are based upon residency of voters.  
237 Despite the absence of what might be considered a suspect classification, the right to vote is  
238 one that is considered to be a fundamental right under both federal and state law. Although  
239 this Court is not required to treat the right to vote as a fundamental right under tribal law,  
240 it is within the discretion of tribal courts to classify tribal voting rights in tribal elections as  
241 fundamental.

242       If we were to consider tribal voting rights afforded by tribal constitutions to be held  
243 to a similar standard as those in state or federal jurisdictions, it would follow that any laws  
244 passed by tribal governments that infringe upon the individual's right to vote should be  
245 reviewed with a strict scrutiny analysis. Under such analysis, the tribal government would  
246 be required to narrowly tailor legislation to achieve a compelling governmental interest  
247 when passing legislation that infringes upon a fundamental right. The record is  
248 insufficiently developed for us to determine whether the equal protection guarantees of the  
249 ICRA have been violated by the absentee voting provision of the Tribal Election Ordinance

or whether the TBC may have had a compelling interest in amending Title XII of the tribal code to treat residents and non-residents differently with respect to the absentee ballot provisions.

### CONCLUSION

Based upon the forgoing, we affirm the decision of the lower court in so far as Article IV, § 2(b) and Article VI, § 3(b) of the Tribe's Constitution are concerned. However, we remand to the lower court for further proceedings and instructions to determine whether the absentee ballot provisions of the election ordinance found in the Title XII of the tribal code violate the ICRA.

It is so Ordered this 28<sup>th</sup> day of July, 2020.

(SEAL)



MICHELLE RIVARD PARKS  
CHIEF JUSTICE  
MHA NATION SUPREME COURT

JAMES MAXSON  
JUSTICE  
MHA NATION SUPREME COURT

JOHN MAHONEY  
JUSTICE  
MHA NATION SUPREME COURT

7/28/20

**MANDAN, HIDATSA & ARIKIRA  
FORT BERTHOLD RESERVATION****IN MHA SUPREME COURT  
NEW TOWN, NORTH DAKOTA**

Raymond Cross,  
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Counsel; Mervin Packineau,  
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the Three Affiliated Tribes Tribal  
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Monica Mayer, individually and as a  
Member of the Three Affiliated Tribes  
Tribal Business Counsel

Defendants/Appellees,

Certificate of Service by Mail  
Case No. CV- 2018-0530  
Case No. AP-2019-006

State of North Dakota )  
 ) ss.  
County of Mountrail )

COMES NOW, Amanda Deville, Supreme Court Clerk and states the following:

That an Order and Certificate of Service was served by me on the following individuals by sending true and correct copies of such documents in the U.S. Mail postage prepaid, in New Town, North Dakota addressed as follows on the 4<sup>th</sup> day of August, 2020.

**Plaintiffs/Appellants**

Lawrence King  
PO Box 1695  
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[lking@zkslaw.com](mailto:lking@zkslaw.com)

**Defendant/Appellees**

Ryan Dreveskracht  
PO Box 15146  
Seattle, WA 98115  
[ryan@galandabroadman.com](mailto:ryan@galandabroadman.com)

I further certify that I am over eighteen years of age and am not a party to this action.

Dated this 4<sup>th</sup> day of August 2020.

Amanda Deville  
Amanda Deville,  
MHA Supreme Court Clerk